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**The situation in Central America: progress in fashioning
a region of peace, freedom, democracy and development**

Activities of the International Commission against Impunity in Guatemala

Report of the Secretary-General

Summary

In its resolution 63/19, the General Assembly requested the Secretary-General to report on the work of the International Commission against Impunity in Guatemala. During the reporting period, the Commission made significant progress in key areas of its mandate, including criminal prosecutions and investigations, as well as in obtaining the approval of important legal reforms. Most importantly, the Commission contributed to raising awareness among the Guatemalan population of the need to end impunity. On the technical side, the Commission made progress in strengthening Guatemalan justice institutions. Its actions before the courts earned the Commission wide media coverage. As a sui generis, non-United Nations body, the Commission also encountered important operational challenges.



I. Introduction

1. The present report is submitted pursuant to General Assembly resolution 63/19, which requested the Secretary-General to submit to the Assembly at its sixty-fourth session a report on the work of the International Commission against Impunity in Guatemala. It follows the letter dated 27 October 2008 from the Secretary-General to the President of the General Assembly (A/63/511), in which he updated the Assembly on the work of the Commission. The present report provides an overview of the ongoing work of the Commission, including its results, the challenges it faces and the broad outline of the Commission's strategy for the next two years. Due to the sensitive character of some of the investigative work conducted by the Commission, the present report is circumscribed to activities of a public nature and does not delve thoroughly into the investigative casework of the Commission.

II. Background

2. The International Commission against Impunity in Guatemala was established at the request of the State of Guatemala as a non-United Nations organ funded through voluntary contributions. It was created through an agreement between the United Nations and the Government of Guatemala signed on 12 December 2006, which was ratified by the Guatemalan Congress on 1 August 2007. The agreement entered into force on 4 September 2007, with a two-year mandate. In a letter dated 24 March 2009, the Minister for Foreign Affairs of Guatemala requested that the Secretary-General agree to extend the mandate of the Commission for a two-year period. On 15 April 2009, the Secretary-General confirmed the extension of the Commission's mandate for a period lasting until 4 September 2011. The extension agreement established through this exchange of letters was ratified on 16 July 2009 by the Guatemalan Congress. The Secretary-General announced the appointment of Carlos Castresana of Spain as Commissioner of the International Commission against Impunity in Guatemala on 14 September 2007 and has renewed his appointment as Commissioner in light of the extension of the Commission's mandate.

3. The key goal of the Commission is to support, strengthen and assist Guatemalan State institutions responsible for investigating and prosecuting crimes allegedly committed by illegal security forces and clandestine security organizations, as well as other criminal conduct related to these entities. It seeks to achieve this goal through: (a) the identification of illegal security groups and clandestine security structures; (b) assistance to the State in the dismantling of such groups and structures; (c) promotion of investigations, criminal prosecutions and punishment of crimes committed by such groups and structures; and (d) through recommendations to the State concerning public policies for eradicating and preventing the re-emergence of such groups and structures. The Commission also has the power to file criminal and/or administrative complaints with relevant authorities against civil servants who contribute to impunity by interfering with the Commission's exercise of its functions or powers.

4. While remaining an international body, the Commission investigates and promotes criminal prosecutions within Guatemala's national justice system. The Commission thus plays a key role in strengthening State institutions responsible for

criminal prosecutions and the procedural and substantive activity derived from the Commission's initiatives remains primarily the responsibility of the Guatemalan State. The Commission can file criminal complaints in Guatemala and join criminal proceedings as a complementary prosecutor (*querellante adhesivo*).

III. Activities

5. In his letter to the President of the General Assembly (A/63/511), the Secretary-General reported on the initial work of the Commission, which involved coordination with the Commission's Guatemalan counterparts and the establishment of collaborative relations. After organizing its operational structure, providing for necessary physical space and basic security, as well as establishing contacts with governmental counterparts, the Commission has focused on its key substantive tasks — namely, criminal investigations and involvement in prosecutions, legal reform proposals and technical assistance. At the same time, the Commission has disseminated information on its activities to civil society organizations and the media.

6. The Commission's activities in Guatemala are set in a context of strong concern about public insecurity and crimes that, more often than not, go unpunished. Through its work, the Commission has responded to national clamour about the need to combat impunity, a problem that has become a leading concern for all sectors of Guatemalan society. The Commission's activities have helped foster hope that the scourge of impunity can be successfully fought. The positive results of the Commission are gradually instilling hope in public opinion that it is possible not only to combat impunity but also to defeat it.

A. Investigations and casework

7. A Special Prosecutor's Office for the Commission was created in September 2008 and installed in the Public Prosecutor's Office, following a bilateral cooperation agreement signed between the Guatemalan Public Prosecutor's Office and the Commission on 27 February 2008. The Special Prosecutor's Office investigates cases within the scope of the Commission's mandate and receives close assistance from the Commission. The Commission's international investigators and lawyers support and provide logistical assistance to these investigations.

8. The Commission and its Special Prosecutor's Office have achieved important results in a number of investigations in collaboration with the Public Prosecutor's Office and the National Civilian Police. In a case involving the incineration of a Nicaraguan bus in which 16 people died, 11 suspects were identified with the assistance of investigators of the Commission, and two of those suspects have been detained. The so-called "Zacapa case", in which 12 people are accused of taking part in a gun battle on 25 March 2008 between rival groups of drug traffickers, is currently in the pre-trial phase. Successful investigations leading to arrests and prosecutions have provided a model for cooperation and coordination between the Commission and the Public Prosecutor's Office.

9. To date, the Commission has been accepted as a complementary prosecutor in nine cases, including the above-mentioned Zacapa case. High-level cases, including

a case against Alvaro Matus, the former head of the Crimes against Life Unit of the Public Prosecutor's Office, and a case against former President Alfonso Portillo, have placed the Commission in the public spotlight and have underscored that investigations and accountability are feasible in Guatemala, even when powerful interests are at stake.

10. At the same time, the Commission has faced repeated obstacles and challenges seeking to contest its legal ability to participate in investigations and prosecutions. Such challenges have primarily involved a procedure known as *amparo* (providing habeas corpus and constitutional guarantees), by which individuals subject to judicial proceedings question the validity of the Commission's involvement on constitutional grounds. Although *amparos* have introduced numerous delays and appeals in the judicial process, the Commission is nonetheless making steady progress in investigations and prosecutions. The Commission has also asked for a reform of the current legislation regulating the *amparo* procedure, so that it may not be used to delay or obstruct justice.

11. At the request of the Guatemalan authorities, the Commission is also investigating the 10 May 2009 murder of attorney Rodrigo Rosenberg. The murder, which took place in a context of heightened concern for public security, unleashed a delicate political crisis. The day after the murder, a video tape circulated throughout Guatemala in which the late Mr. Rosenberg alleged that the President, the First Lady, the President's private secretary and a businessman were involved in his assassination and in the deaths of two of his clients. The Commission's involvement in the investigation of the Rosenberg assassination has helped strengthen trust in the justice system. Against a background of social mobilization following the allegations surrounding the Rosenberg murder, the involvement of the Commission also contributed to the restoration of stability. The investigation is ongoing and has produced important results. On 11 September 2009, six members of a criminal group allegedly responsible for carrying out the Rosenberg murder were arrested. In subsequent days, four more suspects were arrested.

B. Legal reform proposals

12. In keeping with its mandate, the Commission has recommended the adoption of public policies that will enable the eradication of clandestine security organizations and prevent their re-emergence. To this end, the Commission has submitted two sets of legal reform proposals. The first package of suggested reforms was presented in October 2008, including proposals on issues such as: (a) arms and ammunitions; (b) the much abused "law of *amparo*"; (c) the law on the immunities of public officials; (d) criminal procedures; (e) the use of audiovisual testimony of witnesses and experts; (f) witness protection; and (g) the effective collaboration of defendant-informants. The Commission's legal reform proposals resulted in congressional approval of a new Law on Arms and Ammunitions and a Law to Strengthen Criminal Prosecutions.

13. A second package of legislative reforms was presented to the President of Congress in June 2009, including proposals in the following areas: (a) legislation on trafficking in persons; (b) the fight against corruption; (c) disciplinary measures in the criminal justice sector; and (d) international judicial cooperation in criminal matters. On 4 August 2009, Congress approved two additional legislative initiatives

from the Commission's reform proposals: a Law on Criminal Jurisdiction in High-Risk Proceedings, which establishes a legal basis for specialized courts with expanded jurisdiction to hear high-impact cases; and a reform of the Law against Organized Crime, which allows for a reduction of sentences for members of criminal groups who collaborate in the prosecution of organized crime cases.

C. Expert assistance

14. The Commission has provided technical assistance in restructuring the national witness protection programme, including through the training of 48 recent police academy graduates who make up the new personal protection unit of the witness protection programme. The Commission has also worked with the Public Prosecutor's Office on the terms of the new witness protection regulation, which modifies the operational structure of the witness protection programme, establishing witnesses' rights and providing for improved housing conditions. The new regulation was adopted by the Public Prosecutor's Office on 4 May 2009.

15. On 24 November 2008, the Inter-institutional Agreement for the Establishment and Implementation of a Wire-Tapping System was signed by the Public Prosecutor's Office, the Ministry of the Interior and the Commission, in line with Commission recommendations. The Commission is assisting in the training of officials in charge of the Communications Monitoring Centre, which is under the direction of the Public Prosecutor's Office and the Ministry of the Interior. The wire-tapping system has been operational since June 2009 and should be an important asset in the fight against organized crime.

16. More broadly, the Commission is providing capacity-building for the Special Prosecutor's Office and other units within the Public Prosecutor's Office.

D. Other activities

17. The Commission has helped to identify staff in the Public Prosecutor's Office and in the National Civilian Police who were obstructing progress in investigations and legal proceedings. Since the Commission began its activities, more than 1,500 members of the National Civilian Police and some ten Chief Prosecutors and other members of the Public Prosecutor's Office have been suspended or dismissed.

18. The Commission's proposals have also contributed to the signing of a National Agreement for the Advancement of Security and Justice in Guatemala, the objective of which is to define a long-term policy to combat crime. This policy is based on a wide political consensus to make the fight against crime a State priority that transcends the current administration. Concerns exist, however, that the agreement lacks an agenda and budget. The Commission is promoting the effective implementation of the Agreement.

19. Impartial courts are essential if Guatemala is to improve the performance of its system of justice. Similarly, Guatemalan courts will have the final word with regard to the criminal cases in which the Commission is involved. For this reason, the Commission has supported the approval of a Law on Nominating Committees to render the process for the appointment of Supreme Court and Appellate Court judges more transparent. The law was approved on 21 May 2009. Throughout the

appointment process, the Commission has played an active and public role advocating for the selection of suitable magistrates to the Supreme Court, whose members were selected by the Guatemalan Congress on 30 September 2009.

20. The Commission signed a cooperation agreement on 13 February 2009 with the United Nations Children's Fund to carry out studies in favour of children and adolescents, particularly with regard to crimes committed against children and adolescents in the context of the activities of illegal security forces and clandestine security organizations.

IV. Structure, composition and financing

21. The Commission is composed of the following six units: the Office of the Commissioner, the Security Unit, the Administration Unit, the Investigation Unit, the Information and Analysis Unit and the Legal Unit. Currently, the Commission's staff is comprised of 158 officials out of a total of 194 budgeted staff. Of the Commission's total staff, 43 are women and 115 are men. That is, 27 per cent are women and the remaining 73 per cent men. If analysed without taking into account the Security Unit, the percentages shift to 40 per cent women and 60 per cent men. In order to balance these percentages, actions were initiated with several Governments to incorporate female security officers into the Commission. Officials from 24 countries work for the Commission, and the number of Guatemalan staff members has reached 44.

22. The total amount of funds received by the Commission since its establishment has reached \$19,495,560, while expenditures registered for 2007 and 2008 were \$11,300,042 with a balance of \$8,195,518 for 2009. This amount, in addition to funds pledged to date, provides \$11,796,458 in available funds for 2009 or 67.74 per cent of the total budget for 2009, which is estimated at \$17,414,700.

V. Observations

23. The Commission maintains positive collaboration with Guatemalan Government counterparts as well as with opposition political parties, civil society organizations and the media. In July 2009, 35 civil society organizations gathered to express their unconditional support for the work of the Commission. The strong relations between the Commission, diplomatic representatives and international organizations located in Guatemala testify to the high level of international support, both financial and political, that the Commission has received since its inception.

24. Frequent personnel changes within Government institutions, particularly in the justice and security sector, have proved to be a challenge for the interaction of the Commission with the authorities. Guatemala has had seven Directors of the National Civilian Police since 2004, four of whom have held office since the current Government took office. There have also been repeated changes in the leadership of the Ministry of the Interior (four Ministers of the Interior since the start of the Commission's mandate), a key counterpart of the Commission, making it increasingly difficult to maintain a high degree of coordination.

25. Problems within the judicial system continue to hamper the fight against impunity. During the reporting period, important steps forward were often followed

by setbacks. In the section on casework, above, the frequent use of dilatory measures to prevent progress in prosecutions through the use of the *amparo* procedure is described. In addition, some judges appear to be subject to external influence to the detriment of justice. In June 2009, a judge ordered the release of four suspected members of the "Zetas", the armed branch of a Mexican cartel, on a low bail and dismissed 10 of 12 charges filed against them. Yet another judge had turned down, without proper justification, the Commission's request to enter the case against former President Alfonso Portillo as complementary prosecutor, a decision that was overturned. To date, the Commission has requested the removal of immunities of one judge so that she may be tried as a private citizen for obstruction of justice and other crimes.

26. The Commission has insisted on the urgent need to create specialized courts located in Guatemala City to hear high-impact cases, in the belief that specialized courts help provide greater security for judges and ensure impartial decisions. The need for such courts has been made evident in several cases that were transferred repeatedly between regional courts and the capital due to the refusal of regional courts to hear the cases. Security and intimidation of judges plays a factor in such circumstances, as criminal networks are better able to exploit weaknesses in the judicial system outside Guatemala City. The Supreme Court approved a resolution on 21 May 2009 under which the Criminal Chamber of the Supreme Court can transfer the most complex and dangerous cases from courts in the interior of the country to courts in Guatemala City, and Congress approved the Law on Criminal Jurisdiction in High-Risk Proceedings on 4 August 2009. Challenges remain for the implementation of the specialized courts. In particular, there is an urgent need to create a maximum security judicial and penitentiary facility.

27. As the profile of the Commission has increased in Guatemala, so have the security risks facing the Commission. The types of crime that the Commission investigates often relate to activities of powerful criminal networks, some of which are entrenched within Guatemalan institutions. Ensuring the safety and security of the Commission's staff is therefore one of the greatest challenges the Commission faces. Moreover, a number of judges, prosecutors and witnesses involved in the Commission's investigations and prosecutions face threats and are at great risk. Their security is of grave concern and poses a challenge to the functioning of Guatemala's institutions of justice.

28. The Commission's status as a non-United Nations body has created unprecedented operational challenges for both the Commission and the United Nations Secretariat. The Commissioner underscores that the Commission's non-United Nations status has made it difficult to recruit experienced professionals from both inside and outside the United Nations system. The Commission further believes that the lack of United Nations contracts has resulted in incomplete benefits and entitlements for its staff.

29. Under the Commission's founding agreement, and at the insistence of the Guatemalan Government, Guatemalan staff of the Commission do not enjoy immunities for the activities they perform as a result of their work for the Commission. They are therefore at a greater risk than international staff. This is of particular concern in the case of national attorneys who represent the Commission in Guatemalan courts.

30. To address the physical protection of the staff of the Commission, a memorandum of understanding has been developed with the Department of Safety and Security of the Secretariat, providing a framework for collaboration and the Commission will continue to make efforts to improve coordination with the Guatemalan Ministry of the Interior and the National Civilian Police to address concerns regarding potential threats. A draft memorandum of understanding on security is pending approval by the Government of Guatemala. The Commission will also continue to insist that effective protection is provided to judges, prosecutors and witnesses who are at risk.

Next steps

31. The Commission's main objective over the next year will remain to solve serious criminal cases of impunity related to clandestine security apparatuses. It aims to do so through the maximum possible coordination with national law enforcement authorities in order to build their own capacity and demonstrate that clandestine security apparatuses can be successfully dismantled. The Commission will work to improve the functioning of the judicial system through the promotion of transparent procedures in the selection of Supreme Court and Appellate Court judges following the procedures laid out in the recently approved Law on Nominating Committees. Only with a committed judiciary will the justice system be able to function effectively to eliminate corruption and impunity.

32. The Commission will promote the urgent application of the Law on Criminal Jurisdiction in High-Risk Proceedings and the establishment of the specialized courts. The Commission will work with the Minister of the Interior and the Supreme Court to advance this initiative. To ensure further advances in the application of justice, the Commission will remain closely engaged with the President of Congress and political party leaders in an effort to promote the implementation of the Commission's legal reform proposals. Additionally, the Commission will elaborate new legal reform proposals, as needed.

33. During the current period of mandated activities, the Commission is expected to develop a consolidation strategy to ensure that its capacities are transferred to national institutions and that sustained international assistance continues to build on those capacities.

34. The United Nations Secretariat and the Government of Guatemala are discussing the most appropriate way in which to resolve the operational challenges described in the present report, which derive in great measure from the sui generis nature of the Commission as a non-United Nations body.

35. I would like to conclude by expressing my sincere gratitude to Commissioner Castresana and to the staff of the Commission for their dedication and work to support Guatemala's justice institutions and to fight impunity.